

MICHAEL RODAK, JR., CLERK

78-416

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

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IN THE SUPREME COURT OF THE UNITED STATES

Term, 1978

GENE GRIDER - - - - - *Petitioner*

v.

UNITED STATES OF AMERICA - - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

GENE GRIDER, Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in this case on July 10, 1978.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, p. 9) and its opinion on Petition for Rehearing (Appendix B, *infra*, p. 10) are not yet reported. The opinion of the District Court below (Appendix C, p. 11) was not reported.

JURISDICTION

The judgment of the Court of Appeals below (Appendix A, p. 9) was entered on July 10, 1978. The judgment on Petition for Rehearing was entered on August 11, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether a defendant in a criminal proceeding is effectively denied his Sixth Amendment right to confrontation of a witness, when a trial court rereads a very limited portion of a government witnesses' testimony which includes incriminating statements allegedly made by the defendant without also rereading cross-examination testimony.

2. Whether a defendant in a criminal proceeding who exercises his Fifth Amendment right to remain silent is wrongfully penalized for so doing because a limited portion of a government witnesses' testimony is reread and defense counsel's cross-examination is *not* reread, which unduly emphasizes incriminating testimony and effectively denies defendant's right to confrontation of that witness through cross-examination.

3. Whether the Court should grant this writ in order to outline a uniform approach to summarizing and rereading portions of testimony in response to a jury's request, particularly when the defendant has elected to exercise his Fifth Amendment right.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

1. The Fifth Amendment, United States Constitution
2. The Sixth Amendment, United States Constitution
3. The statute under which petitioner was charged and convicted, namely 18 U.S.C. 1001:

Whoever, in any matter with the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than \$10,000.00 or imprisoned not more than five years or both.

STATEMENT OF THE CASE

This action arose out of an indictment returned by the Grand Jury of the Western District of the United States Court at Louisville on August 8, 1977, charging the petitioner with one count of making a false statement or writing to a government agency. The action was tried from Wednesday, October 12, 1977 to Friday, October 14, 1977. At the close of the prosecution's proof, defense counsel pursuant to Rule 29 made a Motion for Judgment of Acquittal. The Trial Judge overruled petitioner's Motion for Directed Verdict and the matter was submitted to the jury. At 3:35 p.m. on Thursday the jury sent a note to the Trial Judge requesting certain testimony be reread and the Trial Judge denied said request. At 5:20 p.m. the same day the jury sent the Trial Judge another note saying they could not reach a unanimous decision and the prospects were not good at which time the Trial Judge sent the jury home and requested they return the next day to further deliberate. On the following day at 10:45 a.m. the jury again sent a note to the Trial Judge and again

requested certain testimony be reread. This time the Trial Judge reread the testimony requested. The jury then reached a verdict finding the petitioner guilty as to count one of the indictment whereupon the Trial Judge set sentence.

REASON FOR GRANTING THE WRIT

The Court of Appeals affirmed the action of the District Court which violated petitioner's constitutional rights.

The petitioner's Sixth Amendment guarantee to confront a witness was effectively denied due to the trial court's limited rereading of the testimony of a government witness, Francis Henry Ebling. Mr. Ebling, a special agent with the Office of Investigation of the United States Department of Agriculture, while testifying read a statement prepared by himself which contained incriminating statements allegedly made by the petitioner to Mr. Ebling. The trial court reread two (2) pages of the transcript of said testimony.

The petitioner chose not to testify on his own behalf at the trial. As a result of the petitioner exercising his Fifth Amendment right petitioner's only means of refuting this witness' testimony was cross-examination by his counsel at trial. Such selective and insufficient rereading once the trial court changed its earlier decision not to reread any testimony or summarize any testimony served to emphasize the direct testimony of the witness. *United States v. Tager*, 481 F. 2d 97, 101 (10th Cir. 1973).

Denial of the right to effective cross-examination involves constitutional error of the greatest magnitude. *Davis v. Alaska*, 415 U. S. 308 (1974). The primary purpose of the Sixth Amendment confrontation clause is the right of cross-examination, *Douglas v. Alabama*, 380 U. S. 415 (1965); "to be confronted with the witness against him" [petitioner]. *Pointer v. Texas*, 380 U. S. 400 (1965). A proper and vital function of cross-examination is to show the witnesses' motivation for testifying and any existing bias or prejudice, *Greene v. McElroy*, 360 U. S. 474 (1959). This was denied the petitioner in this action by a severely restricted rereading of testimony of this government's witness. In spite of strong and lengthy objection by defense counsel the trial court did not read any portion of the cross-examination of said witness. This effectively denied petitioner's Sixth Amendment rights.

Petitioner was penalized because he chose to exercise his Fifth Amendment right to remain silent and not testify in his own defense. The jury did not have the direct testimony of petitioner to weigh against the testimony of Mr. Ebling. If Mr. Ebling's total testimony was ambiguous, unclear and causing the jury problems then to reread only the direct examination was to unduly emphasize it in the jury's mind. To have reread the cross-examination would have avoided this error. The entire length of Mr. Ebling's testimony is only twenty five (25) pages and could have easily been reread in its entirety by the trial court once the decision to reread a portion thereof was made. The case of *United States v. Rabb*, 453 F. 2d 1012 (3rd Cir.

1971) held that the rereading of "forty (40) pages of testimony would take considerably less than one hour," and should be done when requested by the jury to prevent any erroneous view of such testimony. The course of conduct taken by the trial court not only over emphasized the alleged statement made by petitioner to agent Ebling, but effectively denied him his right to cross-examination or acted to so diminish the weight of the cross-examination to effectively deny, in fact, such cross-examination. This result causing undue prejudice and denial of the constitutional rights to the petitioner.

The petitioner's final argument is the Court should grant this writ due to the widely varying and greatly differing course of conduct and exercise of discretion between the Court of Appeals Circuits and the District Courts within them. The list of cases and authorities are numerous with varying opinions. *United States v. Harris*, 521 F. 2d 1089 (7th Cir. 1975), jury requested a portion of petitioner's testimony be reread and trial court reread entire testimony; *United States v. Tager*, 481 F. 2d 97 (10th Cir. 1973), cert. denied, 415 U. S. 914; *United States v. Ballard*, 535 F. 2d 400 (8th Cir. 1976), trial court answered one question by jury about testimony but would not answer a second question; *United States v. Four Star*, 428 F. 2d 1406 (9th Cir. 1970), cert. denied, 400 U. S. 947, trial court reread testimony of F.B.I. agent requested by jury, but after petitioner's testimony had first been reread, *United States v. Rabb*, 454 F. 2d 726 (3rd Cir. 1972), trial court's refusal to reread crucial testimony of witness

requested by jury was reversible error; *Stone v. United States*, 506 F. 2d 561 (8th Cir. 1974), cert. denied, 420 U. S. 978; *United States v. McCoy*, 517 F. 2d 41 (7th Cir. 1975), cert. denied, 423 U. S. 895. Petitioner states the Court should grant this writ and provide guidance to the lower courts in order to direct their future conduct in the area of summarizing and rereading portions of testimony in response to jury request. The Court should use this opportunity to unify lower court action in this area in general and specifically in criminal cases where the petitioner has exercised his constitutional right to remain silent. Uniformity in this matter would protect against further violations of Fifth and Sixth Amendment safeguards.

CONCLUSION

A writ of certiorari should issue to review the judgment and opinion of the Court of Appeals.

Respectfully submitted,

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Counsel for Petitioner

APPENDIX

APPENDIX A**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT****No. 78-5028****UNITED STATES OF AMERICA** - - - *Plaintiff-Appellee**v.***GENE GRIDER** - - - *Defendant-Appellant***ORDER**—Filed July 10, 1978

Before: PHILLIPS, Chief Judge, LIVELY, Circuit Judge,
and PECK, Senior Circuit Judge.

Defendant was convicted at jury trial of having made a false statement to a government agency in violation of 18 U.S.C. § 1001, and perfected this appeal which has been submitted on the record and on the briefs of counsel. Being fully advised in the premises, the Court concludes that sufficient admissible evidence was received to support the finding necessary to the jury's verdict on the issue of the materiality of the statement in question. It is further concluded that the trial court did not abuse its discretion in having portions of the record read to the jury at its request after retirement and in declining to declare a mistrial when it experienced some difficulty in arriving at a verdict. Therefore,

IT IS ORDERED that the judgment of the district court be and it hereby is affirmed.

ENTERED BY ORDER OF THE COURT.

(s) John P. Hehman, Clerk of Court

APPENDIX B

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

No. 78-5028

UNITED STATES OF AMERICA - - - *Plaintiff-Appellee*

v.

GENE GRIDER - - - *Defendant-Appellant*

ORDER—Filed August 22, 1978

Upon consideration of the motion of the defendant-appellant for stay of mandate pending application for certiorari until September 11, 1978.

It is ORDERED that the motion is granted, pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure.

ENTERED BY ORDER OF THE COURT.

(s) John P. Hehman, Clerk

APPENDIX C

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE**

UNITED STATES OF AMERICA

v.

GENE GRIDER

} **CR 77-00152-01-L**

ORDER—Entered October 17, 1977

A trial by Jury in the above-styled action having begun on October 12, 1977 and the Jury having returned to open court at 2:35 P.M. on October 14, 1977 with a verdict of GUILTY as charged, the Court having advised the defendant of his rights concerning the appeal and at the request of counsel for defendant,

IT IS ORDERED that bond herein on appeal be set at \$5,000.00 own recognizance with conditions of release on said bond as set by the Court as follows:

1. The defendant shall NOT be allowed to enter Oldham County, Kentucky with the reasons therefor being given in an oral opinion from the bench into the official record of the Court.

2. The defendant shall report to the United States Probation Office in such manner and at such times as they may direct until final disposition herein.

October 14, 1977

(s) Charles M. Allen, Chief Judge
United States District Court

Copies to:

U. S. Attorney

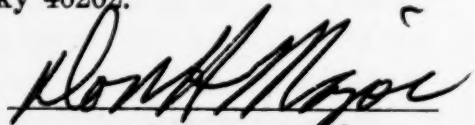
U. S. Marshal

U. S. Probation

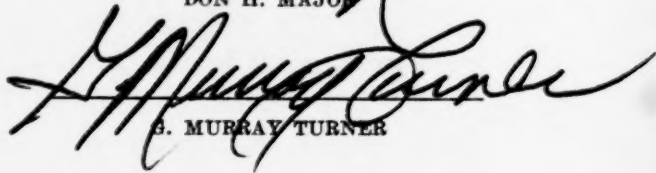
Counsel for defendant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was this
8 day of September, 1978 mailed to David N. Everett,
Assistant United States Attorney, 211 U. S. Courthouse
Building, Louisville, Kentucky 40202.



DON H. MAJOR



G. MURRAY TURNER